***THE HONOURABLE SRI JUSTICE B.SESHASAYANA REDDY**

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+C.R.P.No. 22464 OF 2005

% 03-11-2005

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The Gowthami Solvent Oils Pvt Ltd.,

Post Box No. 7, Pydiparru,

Tanuku. …Petitioner

A N D

$1. The Project Director,

National Highways Authority of India,

Door NO. 78-14-21, Symalanagar,

Rajahmundry –5 33 103, A.P. and Others …Respondents

Counsel for the Petitioner: MR.S.RAVI

Counsel for the Respondents No.1 and 2: MR.S.S.VARMA

Counsel for the Respondent No.3: G.V.N.R.S.S.S. VARA PRASAD

> Head Note :

? CITATIONS :

2004(2) ALD 218

THE HONOURABLE SRI JUSTICE B.SESHASAYANA REDDY

W.P.No. 22464 OF 2005

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3rd November, 2005

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Between:

The Gowthami Solvent Oils Pvt Ltd.,

Post Box No. 7, Pydiparru,

Tanuku. …Petitioner

A N D

1. The Project Director,

National Highways Authority of India,

Door NO. 78-14-21, Symalanagar,

Rajahmundry –5 33 103, A.P. and Others …Respondents

THE HONOURABLE SRI JUSTICE B.SESHASAYANA REDDY

W.P.No. 22464 OF 2005

O R D E R :

1. This writ petition has been filed by Gowthami Solvent Oils Pvt. Ltd., represented by its Managing Director, M.Ramchandra Rao, assailing the action of Respondents No.1 and 2 (the Project Director, National Highways Authority of India, Rajahmundry and National Highways Authority of India, New Delhi) in not considering its technical bids for Tanuku Fees Collection Booths and Krishnavaram Fees Collection Booths on National High way No.5 pursuant to Bid Notice No. NHAI/PIU/RJY/2005-06, dated 27-07-2005.

2. Respondents No.1 and 2 invited bids for collection of Fees on National High Way No. 5 for collection booth located at Tanuku village of West Godavari and

Krishnavaram village of East Godavari District. The petitioner company down loaded a copy of bid document from the respondents No.1 and 2 web site. The bids were to be submitted in two envelopes. The first envelop containing technical bid and the second envelope containing the financial bid. The process of evaluation of bids was that the technical bid would be evaluated first and those found technically eligible would be considered for the financial bid. The date of opening the technical bid was originally stipulated as 22nd September, 2005, but was postponed to 5th October, 2005. The date of submission of bids which were earlier fixed as 22nd Septemebr, 2005 was also postponed to 5th October, 2005. As per Clause 4 (i) of technical bid form, a certified copy of income tax clearance certificate valid on the date of opening of bid is required to be enclosed. Subsequently, a clarification has been issued whereunder a copy of latest income tax assessment order is required to be enclosed to the technical bids. The bids were opened on 5-10-2005 at 5-00 p.m. The petitioner was informed by the 1st respondent that it did not enclose the latest income tax assessment order. Immediately, the petitioner furnished a copy of income tax assessment order for the assessment year 2004-05 dated 18-03-2005. Since the 1st respondent refused to accept the latest income tax assessment order furnished by the petitioner and proceeded to reject the petitioner technical bids, the petitioner company has chosen to approach this Court for the relief stated supra.

3. It is stated in the affidavit filed in support of the writ petition that bid of the petitioner company is excluded on hyper technical and unjust ground. I deem it appropriate to refer paras 6 and 7 of the writ affidavit and they are:

> "*While so, petitioner has reliable information that the 1st respondent, with ulterior motive of favouring other bidders, has recommended to reject the petitioner's technical bid merely on the ground that the petitioner has failed to enclose the copy of the latest income tax assessment order along with the technical bid. It is respectfully submitted that if the petitioner's technical bid is rejected on hyper-technical ground and flimsy ground, the petitioner will not be eligible to be considered for the financial bid. Even if the petitioner quoted the highest figures, petitioner's bid would be rejected on the hyper-technical ground that the petitioner had failed to enclose the latest assessment order while submitting the technical bid. From the circumstances explained above, it would be clear that the petitioner had not enclosed the latest assessment order since the petitioner did not have knowledge of the*

changes made in the bid document till it had submitted its bid on 5-10-2005. The lapse, if any, on the part of the petitioner is neither willful nor due to any negligence but only due to lack of proper communication from the respondents regarding the changes made with regard to the enclosures to be submitted with the technical bid.

It may also be noted that there are only two bidders including the petitioner for Tanuku collection booth and three bidders including petitioner for Krishnavaram collection booth. Hence, if the petitioner is excluded on a hyper technical and unjust ground, the other sole bidder would be become the successful bidder by default in the case of Tanuku and there would be no serious competition for the bidding in respect of Krishnavaram. Hence, it is not in the public interest to exclude competition, it would be detrimental to public interest and to the public exchequer."

4. M/s.A.Srinivasulu and Company came on record as respondent No.3 in the writ petition as per order in WPMP.No.29156 of 2005 dated 25.10.2005.

5. Respondents filed counter affidavits. One K.Nagaraju, Project Director, National High Way Authority of India, Project Implementation Unit, Rajamundry has sworn to the counter affidavit filed on behalf of the respondents No.1 and 2. It is stated in the counter affidavit that the pre-bid meeting was held on 1-9-2005 at 2-00 p.m. in the office of Project Director, National Highways Authority of India, Rajahmundry, wherein 14 prospective bidders including the representative of the writ petitioner company attended the pre-bid meeting and signed the attendance sheet. The bidders have represented that Income Tax Department is not issuing Income Tax Clearance Certificate and therefore, requested the respondents to consider income tax assessment orders instead Income Tax Clearance Certificate from the Income Tax Department. After receipt of clarification from the department, the bidders who have purchased the bid document from NHAI, Rajahmundry and the prospective bidders who have attended pre-bid meeting held on 1-9-2005 have been informed that they are required to enclose latest Income Tax Assessment orders. Accordingly, a letter dated 26.9.2005 has been sent to all the bidders including the petitioner company through DTDC courier, consignment No. H 65541871, dated 26-09-2005. The petitioner company received the said letter on 28-9-2005. The documents

furnished by the bidders along with the technical bid are verified in the presence of the bidders. The petitioner did not furnish latest Income Tax Assessment order and therefore, the bids furnished by the petitioner firm came to be treated as non-responsive in terms of the bid documents and stood rejected.

6. The counter affidavit of the 3rd respondent in brief is that the petitioner did not comply with the basic requirement and conditions enumerated in the tender schedule and therefore, the respondents No. 1 and 2 rightly disqualified the technical bid of the petitioner company. It is further stated in the counter affidavit the requirement of latest Income Tax Assessment order as agreed in pre-bid meeting held on 1-9-2005 has been circulated on 26-09-2005 to all the bidders and the said circular dated 26-9-2005 has also been kept in web site. This respondent deposited an amount of Rs. 3.6 crores as bid security deposit and fulfilled all conditions to be a successful bidder. The writ petitioner having participated in the Pre-Bid Meeting held on 1-9-2005 is estopped from questioning the agreement arrived at between the prospective bidders and the authority.

7. The petitioner filed reply affidavit to the counter affidavit filed on behalf of the respondents No.1 to 3. It is suffice to refer para 5 of the reply affidavit of the petitioner to the counter affidavit of the respondents No.3 and it is thus:

> "*The averments in Para 3 are false. As stated above, the letter dt. 26-09-2005 was not received by the petitioner. It would appear that the 3rd respondent is acting hand-in-glove with the 1st respondent and the 1st respondent has apparently rejected the petitioner's technical bid on flimsy grounds merely to favour 3rd respondent who would become sole bidder by default since there are no other bidders for the Tanuku fee collection booth".*

8. Heard S.Ravi, learned counsel appearing for the petitioner, learned standing counsel appearing for the respondents 1 and 2 and Sri E. Ayyapa Reddy, learned Senior Counsel appearing for the respondent No.3.

9. Learned counsel appearing for the petitioner submits that any amendment to clause 4(i) of Schedule-III of the bid document amounts to variations of the conditions of the tender and unless tender documents are suitably amended, modifications of conditions cannot be given effect. What he means to say is as per

Clause 4 of Schedule-III (Form of technical bid) what is required is certified copy of Income Tax Clearance Certificate valid on the date of opening of the bid and if any other certificate is to be substituted in its place, necessary amendments is required to be made to the said clause and unless and until necessary amendment is made, the proposed clarification cannot be given effect. He made copious reference to instructions to bidders and schedules annexed to it. He further submits that the out come of the pre-bid meeting was not communicated to the petitioner company and therefore, there was no occasion for the petitioner company to know of requirement of latest income tax assessment order to be enclosed to the technical bid.

10. Learned Standing Counsel appearing for the respondents No. 1 and 2 submits that pre-bid meeting was held on 1-9-2005 and all the prospective bidders who have attended the pre-bid meeting expressed their difficulty in securing income tax clearance certificate in view of the circular issued by the Government vide Circular No. 2/2002, dated 10-2-2004 and the request of the prospective bidders have been accepted and accordingly they have been asked to submit latest income tax assessments order and accordingly letters have been addressed to all the prospective bidders. He further submits that the petitioner company having received the letter dated 26-9-2005 did not choose to submit the latest income tax assessment order and therefore, the action of the respondents No.1 and 2 in rejecting the technical bid of the petitioner company is sustainable.

11. Learned Senior Counsel appearing for the 3rd respondent submits that the technical bid submitted by the petitioner is found to be defective because of non-enclosure of Income Tax Assessment Order and thus the action of the respondents No.1 and 2 in rejecting technical bid of the petitioner cannot be found fault. He further submits that pre-bid meeting has been held as per schedule on 1-9-2005 and the petitioner company having participated in the said meeting cannot be permitted to contends that substitution of latest income tax assessment order to the Income Tax Clearance Certificate amounts to amendment of tender conditions. He placed reliance of the decision of our High Court in ***Teja Constructions Vs. Government of Andhra Pradesh*****,** wherein it was held that it is also well settled that the eligibility criteria must be strictly complied with and any bidder who does not satisfy the eligibility criteria must be disqualified.

12. It is no more in dispute that the prospective bidders have to furnish their bids in two envelopes. One envelope containing technical bid and another envelope containing financial bid. Before the last date of submissions of bids, a pre-bid meeting was convened on 1-9-2005. The material placed on record discloses the participation of the petitioner company in the pre-bid meeting. The object of the pre-bid meeting is for clarifications of the bids. I deem it appropriate to refer para 12 of II Schedule of the tender documents (Instructions to the bidders) and it is thus:

> "*Pre-Bid Meeting for clarification of Bids:*
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> *Pre-bid meetings will be held as per the date, time and venue mentioned in the bid invitation notice and in case of extension of time under clause 11(3) on such date and time as may be notified in any of the newspapers or through website of the Authority (WW.nhai.org). All clarifications issued/provided during such meeting, will have to be incorporated in the Contract and will have no independent value/meaning, if not incorporated in the Contract. To assist in examination and evaluation of bids, the Authority may at its discretion, ask the bidder for any clarification of its bid. The request for clarification and the response of the bidder shall be in writing but no change in the bid price shall be sought, offered or permitted".*
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> *Para 7 (1) of Section- II of Instructions to Bidders reads that the technical bid form contain the bid document strictly confirming to the Schedule-III as per para 4 of form of Technical Bid (Schedule III) a certified copy of income tax clearance certificate valid on the date of opening of the bids is required.*

13. In the Pre-bid meeting held on 1-9-2005 all the prospective bidders requested to consider the latest Income Tax Assessment orders in place of certified copy of the Income Tax Clearance Certificate in view of the circular No.2 of 2004 dated 10-2-2004 issued by the Under Secretary 9TPL-III) whereunder it is reiterated that the Income Tax Department will not issue any Income Tax Clearance Certificate. The said pre-bid meeting is attended by the representative of the petitioner company.

14. It is the stand of the petitioner that out come of the Pre-bid meting is not communicated to it. Whereas, the stand of respondents No.1 and 2 is that letter dated 26-9-2005 which contains clarifications has been communicated to the

petitioner company and the same has been received by it on 28-9-2005. Proof of sending the same by the petitioner company through DTDC courier and proof of service of notice on the petitioner company have been placed on record. Therefore, the contention of the petitioner that letter dated 26-09-2005 was not communicated to it by the respondents No.1 and 2 has no substance. When once the petitioner was informed of the requirement of furnishing latest Income Tax Assessment order along with technical bid, it was for the petitioner to furnish the same before 5-10-2005. Admittedly, the petitioner did not furnish the latest Income Tax Assessment order along with technical bid. Therefore, the technical bid offered by the petitioner's company does not satisfy the eligibility criteria. When once the petitioner's company fails to satisfy the eligibility criteria, the bids offered by it need no consideration.

15. In that view of the matter, the action of the respondents No. 1and 2 in rejecting the technical bids cannot be found fault.

16. Accordingly, the writ petition fails and is hereby dismissed. No order as to costs.

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B.Seshasayana Reddy, J.

3nd November, 2005.

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THE HONOURABLE SRI JUSTICE B.SESHASAYANA REDDY

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W.P.No. 22464 OF 2005

3nd November, 2005